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Yong Kar Mun v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–42 OF 2009
HASAN LAH, ABDUL MALIK ISHAKAND BALIA YUSOF JJCA
6 OCTOBER 2011

C

Criminal Law — Arms offences — Discharging firearm in commission of robbery — Whether evidence adduced to prove that robbery was committed by appellant and that at time of committing robbery appellant discharged firearm — Firearms (Increased Penalties) Act 1971 s 3

D

Criminal Law — Penal Code — s 34 — Common intention — Offence of discharging firearm in commission of robbery — Whether prosecution's properly invoked s 34 of the Penal Code

E

Criminal Procedure — Charge — Amendment of — Offence of discharging firearm in commission of robbery — Whether judge misdirected in amending the charge after calling for defence — Power of court to alter or amend charge at any time before judgment pronounced — Criminal Procedure Code s 158

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The appellant was charged for an offence under s 3 of the Firearms (Increased Penalties) Act 1971 (Act 37) ('the Act'). According to the charge (exh 'P2'), the appellant had on 3 June 2002, robbed Maybank branch at Bandar Sri Damansara and during the robbery had fired his firearm at four persons intending to cause injury or death. The High Court later amended the charge

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(exh 'P111') to state that the appellant and one deceased person (Teng Mun Hoong) had committed the robbery. Subsequently the High Court again amended the charge (exh 'P112') to add reference to s 34 of the Penal Code ('Code'). The High Court judge found the appellant guilty as per the amended charge in exh 'P112' and convicted him under s 3 of the Act read with s 34 of

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the Code and sentenced him to death. Hence, this appeal by the appellant. According to the prosecution, the police had proceeded to the Maybank upon receiving report of a robbery in progress. When the police arrived at the scene they saw the appellant and the deceased leaving Maybank. The appellant was holding a pump gun and discharged one shot from the pump gun while

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walking in front of Maybank. The appellant and the deceased then tried to escape on a motorcycle ridden by the deceased. At that time the appellant shot at the police. The police gave chase and shot the deceased. The motorcycle fell down on the road. The appellant surrendered to the police. The appellant in his defence claimed that the deceased had merely asked the appellant to ride the

deceased's motorcycle as a pillion when the deceased and another person robbed the bank. The appellant claimed that he did not enter the Maybank and that while he was waiting outside, he heard gun shots. He denied that he discharged a firearm. However, the CCTV camera recording of Maybank showed that the appellant was the one who had snatched the pump gun from the security guard and discharged the pump gun towards the air as he left Maybank. The appellant appealed on the grounds that: (i) the learned High Court judge had misdirected in calling the defence pursuant to the charge in exh 'P2' and after the defence was called the charge was amended twice as per exh 'P111' and exh 'P112'; and (ii) failure of the prosecution to prove the elements of the amended charge.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) Section 158 of the Criminal Procedure Code ('CPC') empowers the court to alter or amend a charge at any time before judgment is pronounced. Once a charge is altered or amended, it must be read and explained to the accused. Here, the amended charges in exhs 'P111' and 'P112' were read, explained and understood by the appellant and he claimed trials thereto. The amended charges in exhs 'P111' and 'P112' were made before judgment was pronounced. All these were done within the purview of s 158 of the CPC. On the facts, it was justifiable for the learned High Court judge to amend the charges as per exhs 'P111' and 'P112'. Consequently, there was no misdirection on the part of the learned High Court judge when she amended the charge twice as per exhs 'P111' and 'P112' (see paras 56–57 & 59).

(2) Section 34 of the Code must be read with or attached to another offence-creating provision to infer joint responsibility for a criminal act. Thus, when the deceased robbed Maybank, the appellant was equally guilty of the same offence. And when the appellant discharged the pump gun and using his own pistol shot at the police personnel, the deceased was likewise responsible for the whole criminal act. Thus, two or more persons doing an act jointly may be treated as if each of them had done that act individually; *Chota bin Abdul Razak v Public Prosecutor* [1991] 3 MLJ 77; [1991] SLR 675 referred; *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314 referred (see paras 61–62).

(3) The commission of the offence of robbery did not end when the robbers left Maybank with the loot. It continued until the robbers were arrested and the loot recovered outside Maybank. The words 'at the time' appearing in s 3 of the Act 'must be given a broad interpretation as signifying the occasion rather than the moment of the time' when the robbery took place (see para 66); *Sakhuja v Allen* [1972] 2 All ER 311 (HL) referred.

(4) The armed robbery in Maybank using firearms and the shoot-out with

A the police personnel outside Maybank seen in the context of s 390 of the Code showed the culpability of the appellant under s 3 of the Act read with s 34 of the Code (see para 85).

(5) The appellant had failed to raise any reasonable doubt as to his guilt. The B prosecution had proved beyond reasonable doubt the amended charge in exh 'P112' against the appellant (see para 88).

[Bahasa Malaysia summary

C Perayu didakwa bagi suatu kesalahan di bawah s 3 Akta Senjata Api (Penalti Lebih Berat) 1971 (Akta 37) ('Akta'). Menurut pertuduhan ('eksh P2'), perayu telah, pada 3 Jun 2002, merompak Maybank cawangan Bandar Sri Damansara dan semasa rompakan tersebut, telah melepaskan tembakan terhadap empat orang dengan niat hendak menyebabkan kecederaan atau kematian. D Mahkamah Tinggi kemudiannya meminda pertuduhan ('eksh P111') menyatakan bahawa perayu dan seorang lagi yang telah meninggal dunia ('Teng Mun Hoong') telah melakukan rompakan tersebut. Berikutan itu, Mahkamah Tinggi sekali lagi meminda pertuduhan ('eksh P112') untuk menambah rujukan kepada s 34 Kanun Keseksaan ('Kanun'). Hakim E Mahkamah Tinggi mendapati perayu bersalah seperti yang didakwa dalam pertuduhan yang dipinda dalam eksh P112 dan menyabitkannya di bawah s 3 Akta dibaca bersama-sama dengan s 34 Kanun dan menjatuhkan hukuman mati. Dengan itu, rayuan ini oleh perayu. Menurut pihak pendakwaan, pihak F polis bergegas ke Maybank sejurus menerima laporan rompakan sedang berlaku. Apabila pihak polis tiba di tempat kejadian, mereka melihat perayu dan si mati meninggalkan Maybank. Perayu telah memegang senapang patah dan melepaskan satu tembakan daripada senapang patah tersebut ketika berjalan di hadapan Maybank. Perayu dan si mati kemudiannya cuba untuk G melarikan diri dengan sebuah motosikal yang ditunggang oleh si mati. Pada masa itu perayu menembak polis. Polis mengejar dan menembak si mati. Motosikal jatuh di jalan raya. Perayu menyerah diri kepada polis. Perayu dalam pembelaannya mendakwa bahawa si mati hanya meminta perayu untuk menunggang motosikal si mati sebagai pembonceng apabila si mati dan H seorang yang lain merompak bank tersebut. Perayu mendakwa bahawa dia tidak memasuki Maybank dan bahawa ketika dia menunggu di luar, dia mendengar das tembakan. Dia menafikan bahawa dia yang melepaskan tembakan senjata api. Walau bagaimanapun, rakaman CCTV kamera Maybank menunjukkan bahawa perayu adalah orang yang telah merampas I senapang patah daripada pengawal keselamatan dan melepaskan tembakan ke arah udara apabila dia meninggalkan Maybank. Perayu merayu atas alasan bahawa: (i) Yang Arif Hakim Mahkamah Tinggi telah tersalah arah dalam memanggil pembelaan menurut pertuduhan dalam eksh P2 dan selepas pembelaan dipanggil pertuduhan telah dipinda sebanyak dua kali sebagai eksh

P111 dan eksh P112; dan (ii) kegagalan pihak pendakwaan untuk membuktikan elemen pertuduhan yang dipinda. A

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Seksyen 158 Kanun Acara Jenayah ('KAJ') memberikan kuasa kepada mahkamah untuk mengubah atau meminda pertuduhan pada bila-bila masa sebelum penghakiman diberikan. Setelah pertuduhan diubah atau dipinda, ia mesti dibaca dan diterangkan kepada tertuduh. Di sini, pertuduhan yang dipinda dalam eksh P111 dan P112 telah dibaca, dijelaskan dan difahami oleh perayu dan dia minta dibicarakan. Pertuduhan yang dipinda dalam eksh P111 dan P112 telah dibuat sebelum penghakiman diberikan. Kesemua ini dijalankan dalam skop s 158 KaJ. Berdasarkan fakta, adalah wajar bagi yang arif hakim mahkamah untuk meminda pertuduhan seperti eksh p111 dan p112. oleh itu, tiada salah arah di pihak yang arif hakim mahkamah Tinggi apabila beliau meminda pertuduhan tersebut sebanyak dua kali sebagai eksh P111 dan P112 (lihat perenggan 56–57). B C D

(2) Seksyen 34 Kanun mesti dibaca atau dilampirkan bersama dengan peruntukan lain yang mewujudkan kesalahan untuk membuat inferens tanggungjawab bersama bagi perbuatan jenayah. Oleh itu, apabila si mati merompak Maybank, perayu adalah bersesama bersalah atas kesalahan yang sama. Dan apabila perayu melepaskan tembakan dan menggunakan pistolnya sendiri untuk menembak ke arah anggota polis, si mati juga bertanggungjawab bagi keseluruhan perbuatan jenayah tersebut. Oleh itu, dua atau lebih orang yang melakukan sesuatu perbuatan bersama-sama boleh dianggap seolah-olah seperti setiap seorang daripada mereka telah melakukan perbuatan tersebut secara individu; *Chota bin Abdul Razak v Public Prosecutor* [1991] 3 MLJ 77; [1991] SLR 675, dirujuk; *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314, dirujuk (lihat perenggan 61–62). E F G

(3) Perlakuan kesalahan rompakan tidak berakhir apabila perompak meninggalkan Maybank dengan barang rompakan. Ia berterusan sehingga perompak telah ditangkap dan barang rompakan tersebut diperolehi di luar Maybank. Perkataan 'at the time' dalam s 3 Akta mesti diberikan tafsiran yang luas sebagai menandakan kejadian tersebut dan bukannya saat semasa rompakan tersebut berlaku (lihat perenggan 66); *Sakhuja v Allen* [1972] 2 All ER 311 (HL), dirujuk. H

(4) Rompakan bersenjata di Maybank menggunakan senjata api dan tembak-menembak dengan anggota polis di luar Maybank dilihat dalam konteks s 390 Kanun sebagai menunjukkan kebersalahan perayu di bawah s 3 Akta yang dibaca bersama-sama dengan s 34 Kanun (lihat perenggan 85). I

A (5) Perayu telah gagal menimbulkan sebarang keraguan yang munasabah mengenai kebersalahannya. Pihak pendakwaan telah membuktikan pertuduhan yang dipinda dalam eksh P112 terhadap perayu melampaui keraguan munasabah (lihat perenggan 88).]

B **Notes**

For a case on discharging firearm in commission of robbery, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) para 33.

For cases on amendment of charge, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1148–1160.

C For cases on s 34 of Penal Code, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1527–1548.

Cases referred to

Anwar Hussain and another v The State AIR 1952 Assam 47 (refd)

D *Bashir v State* AIR 1953 Allahabad 668 (refd)

Becke, Assignee of Wm Ashton, an Insolvent Debtor v Smith (1836) 2 M & W 191 (refd)

Chota bin Abdul Razak v PP [1991] 3 MLJ 77; [1991] SLR 675, HC (refd)

Doe On The Demise of John Bywater v Charles John Brandling (1828) 108 ER 7

E B & C 643 (refd)

Fenton (Pauper) v J Thorley & Co, Ltd [1903] AC 443, HL (refd)

Halton, Clerk v Cove, Clerk (1830) 109 ER 1 B & Ad 538 (refd)

Harihar Chakravarty v The State of West Bengal AIR 1954 SC 266, SC (refd)

John Stowel v George Zouch, Lord Zouch Saintmaure and Cautelupe (1568) 75

F ER 1 Plowden 353 (refd)

Kish v Taylor [1911] 1 KB 625 (refd)

Low Soo Song v PP [2009] 3 MLJ 36; [2009] 3 CLJ 309, FC (distd)

Msimanga Lesaly v PP [2005] 4 MLJ 314, CA (refd)

G *Ong Poh Cheng v PP* [1998] 4 MLJ 8; [1998] 4 CLJ 1, CA (refd)

Pepper (Inspector of Taxes) v Hart and related appeals [1993] 1 All ER 42, HL (refd)

PP v Ong Poh Cheng [1996] 4 MLJ 279; [1996] 1 CLJ 501, HC (refd)

PP v Tan Kim Kang & Ors [1962] MLJ 388 (refd)

H *Ram Kirpal v Shri Krishna Deo Pratap Singh* AIR 1948 Allahabad 108 (refd)

Sakhuja v Allen [1972] 2 All ER 311, HL (refd)

State of Maharashtra v Vinayak Tukaram Utekar and another [1997] Cri LJ 3988 (Bombay) (refd)

Sussex Peerage, The (1844) 11 C & F 85 (refd)

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Legislation referred to

Criminal Procedure Code s 158

Firearms (Increased Penalties) Act 1971 ss 2, 2(1), 3, 4

Penal Code ss 34, 308, 326, 390

Appeal from: Criminal Appeal No 45–58 of 2002 (High Court, Shah Alam)

Cheah Poh Loon (PL Cheah & Co) for the appellant/accused.
Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent/prosecution.

Abdul Malik Ishak JCA (delivering judgment of the court):

BACKGROUND

[1] The appellant was charged before the High Court at Shah Alam for an offence under s 3 of the Firearms (Increased Penalties) Act 1971 (Act 37) ('the Act') and the charge (exh 'P2') was worded as follows:

> Bahawa kamu pada 3 Jun 2002, jam lebih kurang 3.25 petang di Maybank, No. 7&8, Jalan Tanjong SD 13/1, Bandar Sri Damansara, Sungai Buloh, di dalam Daerah Petaling Jaya, di dalam Negeri Seiangor Darul Ehsan, telah melakukan satu kesalahan yang berjadual iaitu rompakan di Bank tersebut dan semasa melakukan kesalahan itu, kamu telah melepaskan tembakan senjatapi ke arah RF 119962 Julayili bin Hassan, RF 135585 Yuzry bin Awang Takong, RF 141179 Abdul Ghani bin Ahmad dan RF 142322 Mohd Fadzil bin Hj Ibrahim, dengan niat menyebabkan kecederaan atau kematian dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 3 Akta Senjatapi (Penalti Lebih Berat), 1971 (Akta 37) dan boleh dihukum di bawah peruntukan Seksyen yang sama.

[2] On 12 January 2009, the High Court at Shah Alam amended the charge as reflected in exh 'P111' and that amended charge (exh 'P111') was worded as follows:

> PERTUDUHAN PINDAAN
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> Bahawa kamu bersama-sama dengan seorang yang telah meninggal dunia iaitu Teng Mun Hoong (KPT No: 690622-06-5193) pada 3hb Jun 2002 jam lebih kurang 3.25 petang di Maybank, No. 7 & 8, Jalan Tanjong SD 13/1, Bandar Sri Damansara, Sungai Buloh, di dalam Daerah Petaling Jaya, di dalam Negeri Selangor Darul Ehsan, telah melakukan satu kesalahan yang berjadual iaitu rompakan di Bank tersebut dan semasa melakukan kesalahan itu, kamu telah melepaskan tembakan senjatapi ke arah RF 119962 Julayili bin Hassan, RF 135585 Yuzry bin Awang Takong, RF 141179 Abdul Ghani bin Ahmad dan RF 142322 Mohd Fadzil bin Hj Ibrahim, dengan niat menyebabkan kecederaan atau kematian dan dengan demikian kamu telah melakukan kesalahan di bawah Seksyen 3 Akta Senjatapi (Penalti Lebih Berat), 1971 (Akta 37) dan boleh dihukum di bawah peruntukan Seksyen yang sama.
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> Bertarikh pada 12 haribulan Januari 2009.

Again, on 13 February 2009, the High Court at Shah Alam amended the charge as per exh 'P112' and it was worded as follows:

PERTUDUHAN PINDAAN KEDUA

Bahawa kamu bersama-sama dengan seorang yang telah meninggal dunia iaitu Teng Mun Hoong (KPT No: 690622-06-5193) pada 3hb Jun 2002 jam lebih kurang 3.25 petang di Maybank, No. 7 & 8, Jalan Tanjong SD 13/1, Bandar Sri Damansara, Sungai Buloh, di dalam Daerah Petaling Jaya, di dalam Negeri Selangor Darul Ehsan, telah melakukan satu kesalahan yang berjadual iaitu rompakan di Bank tersebut dan semasa melakukan kesalahan itu, kamu telah melepaskan tembakan senjatapi ke arah RF 119962 Julayili bin Hassan, RF 135585 Yuzry bin Awang Takong, RF 141179 Abdul Ghani bin Ahmad dan RF 142322 Mohd Fadzil bin Hj Ibrahim, dengan niat menyebabkan kecederaan atau kematian dan dengan demikian kamu telah melakukan kesalahan di bawah Seksyen 3 Akta Senjatapi (Penalti Lebih Berat), 1971 (Akta 37) dan boleh dihukum di bawah peruntukan Seksyen yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

Bertarikh pada 13 haribulan Februari 2009.

[4] The prosecution called ten witnesses and at the end of the prosecution's case, the High Court at Shah Alam called the defence of the appellant based on the charge in exh 'P2'. The appellant chose to give his evidence on oath and no other witnesses were called by the appellant. After the defence closed its case, the learned deputy public prosecutor who conducted the prosecution applied to recall cadet ASP Zaihairul bin Idrus ('SP10') as a rebuttal witness to rebut the presence of a third party allegedly known as 'Ah Pi' (see p 539 of the appeal record at *jilid* 5). There was no objection by the then learned counsel who had conduct of the defence and the High Court at Shah Alam allowed the rebuttal evidence to be adduced through SP10.

[5] At the end of the defence case, the High Court at Shah Alam amended the charge twice: as per exh 'P111' and exh 'P112' as reproduced earlier. Her Ladyship of the High Court at Shah Alam, after hearing submissions from both sides, found the appellant guilty as per the amended charge in exh 'P112' and convicted him under s 3 of the Act read with s 34 of the Penal Code and sentenced him to death. Aggrieved, the appellant now appeals to this court.

THE CASE FOR THE PROSECUTION

[6] According to Corporal Mohd Khalid bin Lebai Bahar ('SP1') that on 3 June 2002 while he was on duty at the enquiry office of the *pondok polis* at Bandar Sri Damansara, he received a telephone call from a Chinese woman who spoke in the Malay language and who told him that two male Chinese were currently robbing the Maybank at Jalan Tanjong, Bandar Sri Damansara, Petaling Jaya ('Maybank'). This information was reduced into writting by SP1 as a first information report marked as exh 'P5'. In exh 'P5', SP1 stated that the two male Chinese were armed with a pistol each.

[7] SP1 then relayed this information to Constable 141179 Abdul Ghani bin Ahmad ('SP2'), Corporal 119962 Julayili bin Hassan ('SP3') and two other police personnel who were patrolling the Bandar Sri Damansara area on two motorcycles. SP2 rode one of the motorcycles with SP3 as the pillion. SP2 was armed with a revolver.38 with 30 rounds of ammunition. While SP3 was armed with an M16. The other motorcycle was used by the other two police personnel. And together they proceeded to Maybank. All the four police personnel were dressed in police uniforms.

[8] According to SP2, he and SP3 arrived at the scene of the crime about five minutes after he received the information from SP1. After parking his motorcycle, both SP2 and SP3 kept a close watch and SP2 saw two male persons leaving Maybank through its main glass door. And through that glass door, SP2 saw one of the male persons to be thin and the other fat. According to SP2, the thin man wore a dark coloured jacket and a dark coloured crash helmet complete with a dark coloured glass shield to cover his face. The thin man was holding a pump gun and, according to SP2, the thin man discharged one shot from the pump gun while he was walking in front of Maybank. According to SP2, the fat man also used a dark coloured crash helmet complete with a dark coloured glass shield to cover his face. And the fat man was seen carrying a bag and walking ahead of the thin man.

[9] SP2 saw both the fat and the thin men hurriedly left Maybank. The fat man was seen taking a motorcycle and he rode it together with the thin man as his pillion and together they wanted to make a quick get away. SP2 then saw the thin man fired a shot from his pistol at the other police party. SP2 retaliated and using his revolver fired at them. SP2, SP3 and the other police party then gave chase and while doing so they shot at the fleeing robbers. One of the shots hit the fat man who was riding the motorcycle and the motorcycle fell down on the road. When the fat and the thin men fell from their get away motorcycle, their crash helmets also fell apart revealing their faces. The fat man fell flat on the road motionless while the thin man was on his knees and with his pistol he fired at SP2, SP3 and the other police party. SP2, SP3 and the other police party then directed the thin man to surrender and to throw his firearm which he was still holding in his hand. The thin man complied and threw down his pistol.

[10] SP2 then directed the thin man to lie flat on his belly on the road. And at that point of time, SP2 saw SP1 approached the thin man and handcuffed him. SP2 also saw SP1 physically examined the thin man and seized one pistol found tucked at the waist of the thin man. SP2 identified the thin man as the appellant in this appeal. The fat man was also identified as Teng Mun Hoong who has since died ('deceased').

[11] The evidence of SP2 was supported by SP3. SP3 testified that he was

armed with an M16 firearm and that he was responsible for lodging a police report (exh 'P7') pertaining to the arrest of the appellant and the deceased. In that police report in exh 'P7', SP3 also listed the exhibits that were seized as per *lampiran* 'A' annexed to the police report. In *lampiran* 'A', SP3 listed the exhibits seized as follows (see p 683 of the appeal record at *jilid* 7):

(1) WANG TUNAI RM 836,217.00
Singapore Dollar = 4086
Pound Sterling - 335.

(2) 1 BEG PAKAIAN JENAMA LOTUS ITALY
Warna Biru.

(3) SEPUCUK PISTOL JENIS PIETRO BERETTA GARDONE
Caliber 767-PAT
Tiada siri nombor — dirosakkan.

(4) SEPUCUK PISTOL JENIS MAUSER-WERKE A-G OBERNDORF
Caliber.35
3 Butir peluru hidup
Tiada siri nombor — dirosakkan.

(5) SEPUCUK PISTOL JENIS COLT 380 AUTO MUSTANG POCKETLITE
3 Butir peluru hidup
No. Siri: PL 53644.

(6) SEBUAH MOTOSIKAL HONDA EX-5
No plate pendaftaran: BGB 5916 (NOMBOR PALSU).
No Plate Pendaftaran Asal: WJV 6943
No Chasis: GN5-2124505
No Engin: C100E-M3026960
Nama Pemilik: TENG MUN HOONG
K. Pengenalan: 690622-06-5193

(7) 1 BUAH TOPI KELEDAR JENIS INDEX safety Equipment (WARNA BIRU)
Lot No: IN 116
Serial No: 1075

Date of Production: 01/02 Brand: Index
Model: SG-2PQ
Sirim Licence No: PS007606
Size 60.

(8) 1 BUAH TOPI KELEDAR JENIS MARUSHIM (WARNA HIJAU)
Sirim Certified No: PS005001
Manufactured: MS 1:1996
TKC 47941
Size 60.

[12] SP3 was the police officer who guarded the firearms and the monies that were found scattered on the road as well as the appellant and the deceased until they were handed to SP10. SP3 also identified the appellant as the thin man who discharged the firearm towards the police personnel. SP3 also identified the appellant as the individual who used two firearms, namely, a pump gun and a pistol. One of the pistols was seized by SP1 from the waist of the appellant. According to SP3, throughout the whole episode from the moment the appellant and the deceased got out of Maybank and until they fell at the road divider, the deceased did not discharge any firearm at the police even though the deceased had a pistol with him. According to SP3, it was the deceased who rode the get away motorcycle with the appellant as the pillion. SP3 also testified that the appellant who was on his knees on the road had fired at SP3, SP2 and the police party using the same pistol which SP3 saw the appellant was holding. At that point of fime, SP3 saw the pump gun lying on the road near the road divider. SP3 also saw SP2 fired one shot at the appellant. SP3 then directed the appellant to drop his firearm and raise his hands. In a loud voice SP3 shouted 'Letak senjata' and 'Angkat Tangan' and the appellant complied by dropping his pistol and raising both hands. SP3 identified the appellant as the thin man. SP3 also saw the appellant's face for approximately 30 minutes when the appellant fell from the get away motorcycle and the helmet worn by him was also dislodged.

[13] Now, the salient parts of the testimony of SP3 would be as follows. Together with SP2, SP3 proceeded to the scene of the crime at Maybank in full police uniform. After SP2 had parked his motorcycle, both SP2 and SP3 took up positions to the left of Maybank and there they stood vigil. Approximately five minutes later, SP3 saw the two robbers leaving Maybank through its main glass door. The appellant was carrying a pump gun with his right hand. The deceased carried a bag on his shoulders. In the words of SP3 at p 98 of the appeal record *jilid* 1:

> Dia (referring to the deceased) mengalas beg di bahu. Dia mengalas beg satu sahaja. Saya tak pasti beg itu berwarna apa.

[14] According to SP3, at that juncture, both the appellant and the deceased were wearing crash helmets complete with dark coloured glass shields covering their faces. SP3 saw the appellant fired one shot in the air with a pump gun and thereafter SP3 saw both the appellant and the deceased quickly came down from the flight of stairs and the deceased was seen walking hurriedly towards his motorcycle. The appellant fired another shot as he came down from the flight of stairs. And when the appellant saw the other police party that took up positions to the right side of Maybank, he fired another shot at them using a pistol. SP3 described what the appellant did in this way (see p 99 of the appeal record *jilid* 1):

> Dia (referring to the appellant) keluarkan pistol dari pinggang. Dia tembak dengan tangan kanan. Tangan kiri memegang pump gun.

[15] According to SP3, there was an exchange of gunfire between the appellant and the police party. When the deceased reached his motorcycle, SP3 saw the deceased put the bag in the front basket of the motorcycle. The deceased then mounted the motorcycle and started the engine in order to make a quick get away. The deceased manoeuvred the motorcycle with the appellant as the pillion to the right side of Maybank and went past both SP3 and SP2 who were located there. The appellant was seen still holding onto the pump gun. SP3 fired two shots at them while SP2 fired one shot. Both SP3 and SP2 gave chase and SP3 saw the motorcycle fell on the road. The appellant then fired at both SP3 and SP2. SP2 retaliated and he fired one shot at the appellant. At that point of fime, SP3 noticed that the appellant was on his knees when he fired the shots and the pump gun had fallen onto the road.

[16] SP3 testified that the appellant fired two shots at Constable Yuzry and the latter also fired back in return. According to SP3, the deceased fell onto the road divider and the deceased did not fire any shots. In due course, the appellant was placed under arrest by SP1.

[17] Now, SP3 also testified that he saw monies scattered on the road after the get away motorcycle fell onto the road. SP3 also saw two crash helmets lying on the road after both the appellant and the deceased fell from their get away motorcycle. Just like SP2, SP3 also identified the appellant as one of the robbers.

[18] SP3 checked and found that the get away motorcycle was a Honda EX5 bearing a false number plate BGB 5916. The original registration number was WJV 6943 and the said motorcycle belonged to the deceased.

[19] SP1 testified that he used his own personal motorcar to go to Maybank pursuant to the information which he received. But SP1 was afraid and so he

stopped his motorcar at Jalan Tanjong about 50 metres away from Maybank. When SP1 arrived, the shooting episode had ended. He saw that there were two suspects and he too saw the monies that were robbed from Maybank scattered on the road. He too saw two pistols and one pump gun lying on the road divider. He also saw one motorcycle and two crash helmets on the road. He then handcuffed the appellant and physically examined the appellant and found a pistol tucked at the appellant's waist and he quickly seized that pistol. He then placed the pistol which he seized from the appellant on the road together with the rest of the firearms.

[20] Jamil bin Mahmud ('SP4') was the bank manager of Maybank at the material time. According to SP4, when he was on duty on that fateful day, he heard two gun shots being fired inside the bank's premises. Coincidentally, according to SP4, about two weeks ago the bank was also robbed. That prompted SP4 to quickly hide under the table. In the words of SP4 at p 240 of the appeal record at *jilid* 3:

> Ketika saya duduk dan membuat kerja saya, saya terdengar letupan seperti letupan pistol. Saya pandang ke depan. Keadaan senyap. Tak nampak kakitangan saya di kaunter. Saya terfikir lagi kejadian rompakan dan terus menyorok di bawah meja. Sebab 2 minggu sebelum itu cawangan kami telahpun dirompak.

[21] From where he was hiding, SP4 saw the deceased armed with a pistol and was wearing a dark coloured crash helmet complete with a dark coloured glass shield to cover his face. According to SP4, he was forced to open the bank's vault by the deceased. He complied and the deceased took cash monies from the bank's vault. The deceased then put the monies inside a bag which the deceased carried. Throughout his testimony, SP4 referred the deceased as the fat man.

[22] According to SP4, two robbers entered Maybank and they were inside the bank for approximately 15 minutes. And after both the robbers had taken the monies they left the bank. Immediately after the two robbers left Maybank, SP4 heard several gun shots being fired outside the bank. About 15 minutes later, SP4 went out of the bank and saw the two robbers lying on the road and SP4 also saw some police personnel there. SP4 also saw monies scattered on the road.

[23] SP4 then assisted the police in counting the monies. SP4 also handed the tape recording of the CCTV recorded inside Maybank to the investigating officer Chief Inspector Amim Nordin bin Zainun ('SP6'). That CCTV recording captured the events that took place inside Maybank at the material time. SP4 and SP6 viewed the CCTV recording and they saw the two robbers in action inside Maybank and they also saw the deceased carrying the bag

containing the monies. According to SP4, there were two security guards on duty at Maybank during the robbery and that one of the security guards was armed with a firearm.

[24] The evidence of SP4 was corroborated by the evidence of another bank officer working in Maybank, at the material time, by the name of Mohd Nizam bin Mohamad ('SP5').

THE DEFENCE OF THE APPELLANT

[25] In his defence, this was what the appellant had to say. That in 2002 he was staying in Jinjang till 2002. That in 2002 he had a friend who had since died after being shot at the main road in front of Maybank.

[26] That he knew the deceased not by the name of Teng Mun Hoong but rather by the name of 'Hong Chai' and that he did not know when he first knew Hong Chai. That on 3 June 2002, he was arrested near Maybank and at that time he saw Hong Chai being shot. That three to four days before 3 June 2002, Hong Chai visited him at his house. On that occasion, Hong Chai told him that Hong Chai needed his help and that there was a project to be done.

[27] That Hong Chai came to his house riding Hong Chai's own motorcycle. He cannot remember the registration number of Hong Chai's motorcycle. He said that Hong Chai planned to rob a bank with another friend of his. And Hong Chai asked him to ride Hong Chai's motorcycle with Hong Chai as a pillion when robbing the bank.

[28] Hong Chai's friend was known as 'Ah Pi' and he did know Ah Pi that well. When Hong Chai visited his house, Hong Chai brought along Ah Pi and introduced Ah Pi to him. According to the appellant, Hong Chai was fat while Ah Pi was about the same size as him.

[29] On 3 June 2002 at about 9am or 10am, Hong Chai came to his house and waited there till 3pm when he proceeded to Maybank using Hong Chai's motorcycle with Hong Chai ridding pillion.

[30] On arrival at Maybank, he saw that Ah Pi was already there. He testified that both Hong Chai and Ah Pi wore jeans, t-shirts and jackets. He also said that both Hong Chai and Ah Pi wore crash helmets. He knew that Hong Chai carried a pistol because Hong Chai told him so. And he also saw the pistol himself. He said that Ah Pi also had a pistol.

[31] He and Hong Chai then approached Ah Pi. He said that Hong Chai told him to wait outside Maybank.

[32] He said that Hong Chai and Ah Pi entered Maybank. He said that he did not enter Maybank. While he was waiting outside, he heard gun shots but he did not know how many shots were fired.

[33] He said that soon thereafter, both Hong Chai and Ah Pi exited from Maybank and he saw both of them carried one bag each containing monies. He said that both of them then handed the bags to him and he placed them in the front basket of the motorcycle. Hong Chai then asked him to start the motorcycle. According to the appellant, the situation at that time was quiet tense. And even before Hong Chai mounted the motorcycle, gun shots were exchanged. He was frightened.

[34] He saw Hong Chai placed the pump gun in the front basket of the motorcycle and he then rode the motorcycle with Hong Chai riding pillion. At that time he was unarmed. He rode the motorcycle while Hong Chai who was riding pillion fired gun shots towards the rear. He did not see what was happening then as he was riding the motorcycle and facing the front. The motorcycle accidentally hit the road divider on the main road and the motorcycle fell. He and Hong Chai also fell on the road. He noticed that Hong Chai's body was covered with blood.

[35] According to the appellant, he did not know what had happened to Ah Pi. And that he only managed to see that Ah Pi rode another motorcycle but he did not know in which direction Ah Pi went.

[36] He denied that he discharged a firearm while he was on the motorcycle. He said that the evidence of the police that he discharged a firearm while riding pillion on the motorcycle was not true because he rode the motorcycle with the deceased as his pillion and he did not discharge any firearm. He said that it was Ah Pi and Hong Chai who exchanged gun shots with the police.

[37] According to the appellant when he saw Hong Chai lying on the road in a pool of blood, he raised both his hands up. And the police approached him and arrested him. He was handcuffed by the police. He was then taken in a car separately from Hong Chai.

[38] He said that the police did not seize any firearm from him because he did not hold onto any firearm nor use the firearm. And that he was right handed.

[39] He was cross-examined by the learned deputy public prosecutor along the following lines:

(a) that it was he and not Hong Chai that carried the pump gun when he went out of Maybank;

(b) that it was he and not Hong Chai who discharged one shot from the pump gun while exiting Maybank;

(c) that Ah Pi was non-existent, fictitious and an after thought;

(d) that when he and Hong Chai exited from Maybank, he saw uniformed police personnel and he fired shots at them and he then fled with Hong Chai using a motorcycle;

(e) that in reality it was Hong Chai who rode the motorcycle with him riding pillion and together they made an attempt to escape;

(f) that while riding pillion, it was he who shot at the police;

(g) that both he and Hong Chai fell from the get away motorcycle because Hong Chai was hit by police gun fire;

(h) that he only surrendered when he failed to discharge a firearm held by him; and

(i) that after his arrest, the police recovered on his person a pistol.

[40] In re-examination, he said that Hong Chai had used Ah Pi when Hong Chai entered Maybank to commit robbery because Hong Chai told him that Ah Pi knew how to use a firearm. He said that he did not know how to use a firearm and that in his cautioned statement he had stated about the role played by Ah Pi but he was not certain that this information was recorded by the police officer.

REBUTTAL WITNESS

[41] After the defence had closed its case, the learned deputy public prosecutor recalled SP10 to rebut the presence of Ah Pi. Since the then learned counsel had no objection, SP10 was recalled. SP10 testified that throughout his investigation, the appellant did not mention in regard to a third party by the name of Ah Pi. Under cross-examination, SP10 reiterated the same version.

TAPE RECORDING CCTV CAMERA OF MAYBANK

[42] It was played in open court before the learned High Court judge as well as the relevant parties.

[43] Now, the appellant, in his defence, stated that Hong Chai (the deceased fat man) was the person who seized the pump gun from the security guard inside Maybank and then got out of the bank. But, the learned High Court judge rightly pointed out that what was recorded by the CCTV camera of Maybank in its tape recording (exh 'P43') together with the photographs (exhs 'P44(1–61)') as well as the evidence of SP2 and SP3 showed that it was the thin man (that would be the appellant) that had snatched the pump gun from the security guard inside Maybank and then got out of Maybank with the deceased and it was the appellant who pulled the trigger of the pump gun and discharged the pump gun towards the air as he left Maybank.

ANALYSIS

[44] Only two issues were raised before us by learned counsel for the appellant and we will focus our attention to these two issues only. The first issue concerned the purported misdirection by the learned High Court judge in calling the defence of the appellant pursuant to the charge as seen in exh 'P2' and after the defence was called the charge was amended twice as per exh 'P111' and then as per exh 'P112'. The second issue concerned the failure on the part of the prosecution to prove the elements of the amended charge.

THE FIRST ISSUE

[45] It centred on the charge preferred against the appellant. Before the trial proceeded, the prosecution relied on the charge as per exh 'P2' which has been reproduced in the early part of this judgment. Only the appellant was charged for an offence under s 3 of the Act and that section reads as follows:

> Penalty for discharging a firearm in the commission of a scheduled offence
>
> 3. Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused thereby, be punished with death.

[46] Section 2(1) of the Act explains the meaning of a 'scheduled offence' in this way:

> 'scheduled offence' means any offence enumerated in the Schedule.

[47] The Schedule lists the type of offences caught under s 2(1) of the Act. It is worded as follows:

SCHEDULE

(Section 2)

(1) Extortion.

(2) Robbery.

(3) The preventing or resisting, by any person, of his own arrest or the arrest of another by a police officer or any other person lawfully empowered to make the arrest.

(4) Escaping from lawful custody.

(5) Abduction or kidnapping under sections 363 to 367 of the Penal Code and section 3 of the Kidnapping Act 1961 (Act 365).

(6) House-breaking or house-trespass under sections 454 to 460 of the Penal Code.

[48] The charge in exh 'P2' does not mention the name of the deceased nor does it invoke the principle of common intention as set out in s 34 of the Penal Code. At p 501 of the appeal record at *jilid* 5, at the close of the prosecution's case on 15 October 2008 the learned High Court judge had this to say:

> Mahkamah berpuashati bahawa pihak pendakwaan telah menunjukkan satu kes prima facie terhadap tertuduh atas kesalahan sepertimana yang dinyatakan dalam pertuduhan, P2. Mahkamah dengan ini memanggil tertuduh untuk memasukkan pembelaannya.

[49] After the three alternatives were explained to the appellant, he elected to give his evidence on oath (see p 503 of the appeal record at *jilid* 5).

[50] After the appellant gave his evidence on oath, the learned High Court judge amended the charge in exh 'P2' with that of a new amended charge as per exh 'P111' as reproduced earlier. The amendment of the charge was made on 12 January 2009. At pp 562–563 of the appeal record at *jilid* 5, the amended charge in exh 'P111' was read, explained and understood by the appellant and he claimed trial and he did not wish to recall any witness. In its original text, this was what the learned High Court judge wrote:

> Mahkamah: Pertuduhan terhadap Tertuduh, P2, hendaklah dipinda dengan menambah selepas perkataan 'kamu' di baris pertama, perkataan seperti berikut:
>
> 'bersama-sama dengan seorang yang telah meninggal dunia iaitu Teng Mun Hoong (KPT No: 690622-06-5193)'
>
> Pertuduhan pindaan ditandakan P111. Sila bacakan pertuduhan pindaan kepada Tertuduh.
>
> P111: dibaca dan diterangkan kepada Tertuduh dalam loghat Kantonis.

Tertuduh: Faham dan pohon untuk bercakap dengan peguambela.

Mr. Gurbachan: No.

(Mr. Gurbachan approaches the Accused and speaks to him quietly.)

Tertuduh: Tidak mengaku salah dan ingin dibicarakan.

Court: Does the defence wish to recall any witness?

Mr. Gurbachan: The defence does not wish to do that.

But I would like to make submissions on the amendment.

I need a few days to prepare my submissions.

Mahkamah: Permohonan untuk penangguhan dibenarkan.

[51] The amended charge in exh 'P111' was again amended. This time it was amended on 13 February 2009 and the amended charge can be seen in exh 'P112'. The notes of evidence carried this caption (see p 564 of the appeal record at *jilid* 5):

Mahkamah: Pertuduhan pindaan terhadap Tertuduh, P111, hendaklah dipinda dengan menambah selepas perkataan 'sama' di baris terakhir perkataan-perkataan seperti berikut:

'dan dibaca bersama seksyen 34 Kanun Keseksaan.'

Pertuduhan pindaan kedua ini ditandakan P112 Sila bacakan pertuduhan pindaan kedua, P112 kepada Tertuduh.

P112 dibaca dan diterangkan kepada Tertuduh dalam loghat Kantonis.

Tertuduh: Minta bicara.

Minta bicara: Adakah pihak pembelaan ingin memanggil semula saksi-saksi pihak pendakwaan?

[52] The final amended charge in exh 'P112' was read, explained and understood by the appellant. And when the appellant was asked as to whether the appellant wished to recall any of the prosecution's witnesses, the exchanges between the court and the defence were recorded in this way (see pp 565–568 of the appeal record at *jilid* 5):

PB En Amrit Pal Singh:

We are not ready for the second amendment. For the first amendment we are ready with our written submissions. My instructions are to tender the written submissions on behalf of Encik Gurbachan Singh who has a case in the Temerloh High Court. He did not give me the number of the case. It is a s 39B case. Also fixed for submissions today.

Court: Is the case older than this case?

P.B. My humble apologise. I do not know.

Court: Mr. Gurbachan Singh has not written to the court to ask for his presence in court today to be excused.

PB En Amrit Pal Singh:

I do not know about that. Since the matter is fixed for written submissions today he has asked me to hand over the written submissions on his behalf today.

Court: Why was a copy of the written submissions not extended to the court and to the learned DPP before today if the matter was fixed for written submissions today?

En. Amrit Pal Singh:

I do not know.

Court: Do you have M Gurbachan Singh's free dates since you are mentioning on his behalf today?

En Amrit Pal Singh:

No. I do not know.

I will leave it to the court to fix a date and I will tell him it is compulsory for him to attend court on that day.

Court: Encik Salim the learned TPR has come all the way from Sabah to attend court for this case today. Mr Gurbachan Singh is aware of that.

En. Amrit Pal Singh:

My apologies. I will call Mr Gurbachan Singh on his hand phone.

Mahkamah: Kes ini adalah ditangguhkan sebentar untuk Encik Amrit Pal Singh mendapatkan tarikh lapang Encik Gurbachan Singh untuk (Sambung Bicara) kes ini selama 2 hari berturut-turut.

tt. High Court Judge 10.35 pagi

45-58-02

11.15 pagi

Kes dipanggil semula.

TPR: Pihak-pihak adalah sama seperti pagi tadi.

Mahkamah: Setelah menyemak nota-nota prosiding yang dirakamkan pada 12.1.2009 Mahkamah dapati Mr Gurbachan tidak memohon kebenaran untuk memasukkan penghujahan bertulis dan Mahkamah tidak membenarkan penghujahan bertulis dimasukkan. Apa yang berlaku ialah Encik Gurbachan telah memohon untuk membuat penghujahan atas pindaan yang dibuat oleh Mahkamah kerana beliau memerlukan beberapa hari untuk menyediakan penghujahannya. Dan Mahkamah telah membenarkan permohonan beliau.

Mahkamah kepada P.B. Encik Amrit Pal Singh:

Adakah telah dapat tarikh lapang Encik Gurbachan Singh untuk (Sambung Bicara) kes ini?

Encik Amrit Pal Singh:

Ya, pada 5 dan 6.2.2009. Nombor kes di Mahkamah Tinggi Temerloh ialah 45-08-02.

TPR Kedua-dua tarikh adalah sesuai kepada saya.

Mahkamah: Kes ini adalah ditetapkan untuk (Sambung Bicara) dan Sambung Penghujahan secara lisan pada hari Khamis dan Jumaat 5 dan 6.2.2009 pada jam 9.30 pagi.

TPR Kedua-dua pihak boleh memanggil semula saksi. Sekiranya pihak pembelaan ingin memanggil semula mana-mana saksi, saya minta peguambela menulis surat dan pohon secara awal supaya pihak pendakwaan dapat membuat persediaan untuk saksi-saksi berkenaan hadir di Mahkamah.

Mahkamah: Pihak pembelaan adalah diperintahkan untuk memberi notis yang awal secara bertulis kepada TPR yang bijaksana Encik Salim sekiranya ingin memanggil semula saksi-saksi untuk (Sambung Bicara) kes ini yang ditetapkan pada 5 dan 6.3.2009. Ini adalah penangguhan yang terakhir.

t.t. High Court Judge

11.26 pagi.

[53] It was only on 5 March 2009 when the High Court was in session, that learned defence counsel for the appellant declined the offer to recall any witness. The notes of evidence at p 568 of the appeal record at *jilid* 5 carried the following tale:

PB: Ucapkan terima kasih kerana memberi peluang kepada kami untuk memanggil saksi-saksi memandangkan pindaan yang telah dibuat oleh Yang Arif.

Walau bagaimanapun tidak ingin memanggil saksi. Tidak ingin membuat apa-apa hujahan. I apologise to My Lady for not being able to attend court on the last date.

TPR: Pihak pendakwaan juga tidak ingin memanggil mana- mana saksi untuk pindaan kedua.

Mahkamah: Kes ditangguhkan sebentar sehingga jam 10.30 pagi (Keputusan).

[54] At 10.40am on 5 March 2009, the learned High Court judge found the appellant guilty under s 3 of the Act read with s 34 of the Penal Code and sentenced him to death for the amended charge in exh 'P112'. At pp 569–570 of the appeal record at *jilid* 5, the following write-ups appeared:

A Keputusan Pada Akhir Kes Pembelaan

Mahkamah berpuashati bahawa pembelaan telah gagal menimbulkan satu keraguan yang munasabah dalam kes pihak pendakwaan. Mahkamah berpuashati bahawa pihak pendakwaan telah membuktikan pertuduhan pindaan kedua, P112, terhadap Tertuduh tanpa sebarang keraguan yang munasabah.

B

Tertuduh adalah didapati bersalah kerana telah melakukan kesalahan di bawah s 3 Akta Senjatapi (Penalti Lebih Berat) 1971 (Akta 37) yang boleh dihukum di bawah s 3 Akta yang sama sepertimana pertuduhan pindaan kedua, P112.

Rayuan Meringankan Hukuman

C

Tertuduh sekarang berumur 44 tahun. Telah kahwin. Tidak mempunyai anak-anak. Beliau ialah pesalah pertama. Tertuduh telah kesal atas perbuatan beliau.

The Accused was misled by the deceased Teng Mun Hoong. The Accused played a minor role compared to the deceased.

D

The Accused was arrested and detained since 3.6.2002 and has since been under remand until now.

Prior to the arrest he was a salesman selling mineral water and earning about RM2000/- a month with which he supported his family and parents.

E Pray for leniency.

Penghujahan TPR yang biiaksana

Kesalahan adalah satu yang serius dengan menggunakan senjata api dengan tujuan mencederakan anggota polis yang menjaga keamanan pada masa tersebut.

F

Daripada keterangan yang dikemukakan ke Mahkamah menunjukkan Tertuduh memainkan peranan yang besar iaitu melepaskan tembakan walaupun dinafikan oleh pembelaan.

Tertuduh telah ditangkap sejurus selepas kejadian rompakan dan senjata api telah

G dirampas dari tempat kejadian.

Mengikut kesalahan di bawah s 3 Akta tersebut hanya satu hukuman sahaja yang boleh dijatuhkan oleh Mahkamah iaitu hukuman mati mandatori.

Pohon Tertuduh dijatuhkan hukuman yang diperuntukkan oleh undang-undang.

H

PB: Saya tidak ingin membalas.

Mahkamah: Tertuduh adalah disabitkan dan dihukum gantung sehingga mati di bawah s 3 Akta Senjatapi (Hukuman Lebih Berat) 1971 (Akta 37). Tertuduh hendaklah digantung di leher sehingga Tertuduh meninggal di bawah s 227 Kanun Acara Jenayah.

I

Ini adalah hukuman mandatori yang diperuntukkan di bawah s 3 Akta tersebut.

Mahkamah tidak ada budi bicara untuk menjatuhkan hukuman yang lebih ringan dari itu.

[55] And the sentence of death was stayed pending appeal to this court (see p 571 of the appeal record at *jilid* 5). A

[56] Now, s 158 of the Criminal Procedure Code ('CPC') empowers the court to alter or amend a charge at any time before judgment is pronounced. And once a charge is altered or amended, it must be read and explained to the accused. Here, the amended charges in exhs 'P111' and 'P112' were read, explained and understood by the appellant and he claimed trials thereto. The appellant also declined the offer to recall any witnesses. The amended charges in exhs 'P111' and 'P112' were also made before the judgment was pronounced. All these were certainly done within the purview of s 158 of the CPC and that section enacts as follows: B C

158 Court may alter or add to charge.

(1) Any Court may alter or add to any charge at any time before judgment is pronounced. D

(2) Every such alteration or addition shall be read and explained to the accused.

E

[57] It is crystal clear that s 158 of the CPC is worded widely. It permits the court to amend the charge at any stage before judgment is pronounced (*Public Prosecutor v Tan Kim Kang & Ors* [1962] MLJ 388). In our judgment, it is permissible under s 158 of the CPC to amend the charge after defence has been called but before judgment is pronounced. F

[58] The learned High Court judge was right when she gave the opportunity to the appellant to recall or re-examine any witness when the charge was amended after the defence was called. The denial of such right is, in our judgment, not curable (*Anwar Hussain and another v The State* AIR 1952 Assam 47). G

[59] If there are any defects to the charge whether they are discovered at the inception of the trial or at any subsequent stage of the trial prior to the pronouncement of the judgment, the court is empowered to amend the charge. It must be borne in mind that the jurisdiction to amend a charge or add an entirely new charge is exercisable on the facts of each particular case and such facts must justify such an amendment (*Harihar Chakravarty v The State of West Bengal* AIR 1954 SC 266). In our judgment, on the facts, it was justifiable for the learned High Court judge to amend the charges as per exhs 'P111' and 'P112'. Consequently, there was no misdirection on the part of the learned High Court judge when she amended the charge twice as per exhs 'P111' and 'P112'. H I

[60] The final amended charge in exh 'P112' brings into sharp focus s 34 of the Penal Code. That section reads as follows:

> Each of several persons liable for an act done by all, in like manner as if done by him alone
>
> 34 When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[61] Section 34 of the Penal Code throws the net of criminal liability wider. It imposes joint criminal liability on persons who participate in the commission of an offence. Standing alone s 34 of the Penal Code does not create a substantive offence. The section must be read with or attached to another offence-creating provision to infer joint responsibility for a criminal act (per LP Thean J in *Chota bin Abdul Razak v Public Prosecutor* [1991] 3 MLJ 77; [1991] SLR 675, and adopted by Gopal Sri Ram JCA in *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314). Thus, two or more persons doing an act jointly may be treated as if each of them had done that act individually. Desai J in *Bashir v State* AIR 1953 Allahabad 668, aptly said (p 674):

> (19) If the conditions mentioned in s 34 are fulfilled, then each of the persons or conspirators is responsible for the whole criminal act done by all of them. If A and B do a criminal act in furtherance of their common intention, each of them is guilty of that offence of which he would have been guilty if he alone had done the whole criminal act. The law makes no distinction between them or between the parts played by them in doing the criminal act; each is guilty of the same offence.

[62] Thus, when the deceased by the name of Teng Mun Hoong or Hong Chai as the appellant called him robbed Maybank, the appellant is equally guilty of the same offence. And when the appellant discharged the pump gun and using his own pistol shot at the police personnel, the deceased was likewise responsible for the whole criminal act. It is as simple as that.

THE SECOND ISSUE

[63] A perusal of the amended charge in exh 'P112' shows that the appellant was charged together with the deceased for committing a scheduled offence, to wit, robbery in Maybank and while committing the said offence discharged a firearm in the direction of the police personnel with intent to cause hurt or death, an offence punishable under s 3 of the Act read with s 34 of the Penal Code.

[64] The salient facts showed that:

(a) both the appellant and the deceased entered Maybank to commit a

scheduled offence, to wit, robbery and both of them were armed with firearms and both wore dark coloured crash helmets that covered their faces;

(b) the appellant grabbed the pump gun from one of the security guards inside Maybank;

(c) gun shots were fired inside Maybank but those shots were aimed at the ceiling (see photographs P41(6) and P41(7));

(d) the deceased took cash monies from the bank's vault after forcing SP4 to open the bank vault and the deceased then put those monies in a bag and at that time the appellant stood guard armed with firearms;

(e) both the appellant and the deceased hurriedly left Maybank after accomplishing their mission and the appellant was seen discharging one shot from the pump gun as he left Maybank;

(f) the deceased rode his own motorcycle with the appellant as the pillion and together they took flight with their loot;

(g) outside Maybank while the robbers (the appellant and the deceased) were fleeing with their loot, gun shots were exchanged between the appellant and the police;

(h) when the deceased was shot while riding the get away motorcycle, he fell onto the road in a pool of blood and the motorcycle too fell on the road together with the loot;

(i) not relenting, the appellant continued to exchange gun shots with the police personnel until he was forced to surrender; and

(j) the stolen monies from Maybank were found scattered on the road when the escape bid was foiled by the police personnel.

[65] The Federal Court in *Low Soo Song v Public Prosecutor* [2009] 3 MLJ 36; [2009] 3 CLJ 309 considered s 3 of the Act in extenso. At pp 42–43 (MLJ); pp 316–317 (CLJ), the Federal Court had this to say:

> [12] What the prosecution had to prove for the offence under s 3 against the appellant were:
>
> (i) that there was a robbery committed by the appellant;
>
> (ii) that the appellant at the time of his committing the robbery discharged a firearm; and
>
> (iii) that the appellant intended to cause death or hurt to some person.
>
> Be it noted that even if no hurt was caused by the discharge of the firearm, it is of no consequence to the offence.
>
> [13] The wordings of s 3 of the Act, in particular, 'any person who at the time

of his committing … a scheduled offence discharges a firearm' clearly means that the prosecution must prove that it was the appellant who committed the act of robbery and had discharged a firearm whilst committing the offence. Jeffrey Tan JC (as he then was) in *Public Prosecutor v Ong Poh Cheng* [1996] 4 MLJ 279; [1996] 1 CLJ 501 had the opportunity to interpret the phrase 'at the time of his committing' at p 510:

> That s 3 is a penal provision is beyond any argument, and its meaning, giving it a strict interpretation, as is the rule, to penal provisions, must therefore be narrowly construed. The natural meaning of the words 'at the time of his committing the offence' emphasises the time of the commission of the offence and specifies the discharge of a firearm before the completion of a scheduled offence. The choice in the language — the present participle — was deliberate and reflected the legislature's intention to have severely punished the commission of a scheduled offence, but only if a firearm was discharged during but not after the offence.

In our judgment, the learned judicial commissioner's interpretation of the phrase is correct. It may be noted that *Ong Poh Cheng*'s case went on appeal to the Court of Appeal and the High Court's decision was upheld (*see* [1998] 4 MLJ 8; [1998] 4 CLJ 1) and a further appeal to the Federal Court (Wan Adnan CJ (Malaya), Dr Zakaria Yatim FCJ, Chan Nyarn Hoi JCA) was dismissed vide Mahkamah Persekutuan Rayuan Jenayah No 05–9 Tahun 1998(P) dated 24 November 1998. However, there was no written judgment of the Federal Court.

[66] Relying on the Federal Court case of *Low Soo Song v Public Prosecutor* which agreed with the decision of the High Court in *Public Prosecutor v Ong Poh Cheng* [1996] 1 CLJ 501 which was affirmed by the Court of Appeal vide *Ong Poh Cheng v Public Prosecutor* [1998] 4 CLJ 1, and further affirmed by the Federal Court without any written judgment, learned counsel for the appellant argued that discharging the firearm must be 'at the time of his committing' the scheduled offence, to wit, robbery. The facts, however, according to learned counsel for the appellant showed that robbery took place *inside Maybank* and the exchange of gun fire took place *outside Maybank*. But we categorically say that from the available evidence, two gun shots were fired inside Maybank and those gun shots were aimed at the ceiling. According to SP4, on hearing those gun shots that were fired inside Maybank, he quickly took cover under the table because of the earlier robbery that took place in Maybank some two weeks earlier. SP4's evidence showed that at the time the appellant and the deceased were committing the robbery, two gun shots were discharged with a firearm inside Maybank with intent to cause death or hurt to any person notwithstanding that no hurt was caused because the two shots were aimed at the ceiling. And when the robbers (the appellant and the deceased) fled with the bag full of monies on the get away motorcycle, the offence of robbery was

still continuing and gun shots were still being exchanged with the police personnel outside Maybank. In our judgment, the commission of the offence of robbery did not end when the robbers left Maybank with the loot. It continued until the robbers were arrested and the loot recovered outside Maybank. The words 'at the time' appearing in s 3 of the Act 'must be given a broad interpretation as signifying the occasion rather than the moment of the time' when the robbery took place (per Viscount Dilhorne in *Sakhuja v Allen* [1972] 2 All ER 311, 330 (HL)).

[67] The Federal Court case of *Low Soo Song v Public Prosecutor* can be distinguished on the facts. In that case, the appellant's accomplice who was still at large and who had robbed victim PW3 of her gold jewellery and had ransacked her home. The appellant, on the other hand, was the one who had shot and injured the daughter of the victim ('PW4'). The appellant's appeal to the Court of Appeal was dismissed and the appellant appealed to the Federal Court. In the Federal Court, the appellant's counsel submitted, inter alia, that the courts below had erred in linking the act of robbery to the appellant since the appellant was not charged for the offence in furtherance of a common intention under s 34 of the Penal Code. The Federal Court allowed the appeal and substituted the conviction under s 3 of the Act with a conviction for voluntarily causing grievous hurt under s 326 of the Penal Code.

[68] The facts in *Public Prosecutor v Ong Poh Cheng* can also be distinguished. In that case, the accused came alone as a customer to the complainant's goldsmith shop, whipped out a gun and demanded the gold ornaments displayed in the counter. After obtaining some gold ornaments, the accused walked out of the shop with the gun in his right hand. The accused was seen discharging his firearm at some adjoining shops. Two police constables (PW9 and PW12) who were in the vicinity proceeded to investigate whereupon the accused shot at the constables resulting in an exchange of gun fire. The accused escaped on a motorcycle. Three bullet slugs were recovered in the complainant's shop and flower pot outside and an armaments officer testified that the slugs were not government issue. The three bullet slugs were not examined by a ballistics expert. The gold ornaments recovered were identified by the complainant as the ones that were handed to the accused. At the end of the prosecution's case, the High Court amended the original charge under s 3 of the Act to s 4 of the Act and the High Court also added a charge under s 308 of the Penal Code and called upon the acccused to enter his defence on the amended charges. The accused elected to give his evidence on oath and he was convicted on the amended charges.

[69] Since there was only one accused person in *Public Prosecutor v Ong Poh Cheng*, s 34 of the Penal Code was not invoked.

[70] Whereas in our present case, the appellant was charged together with the deceased for an offence under s 3 of the Act read with s 34 of the Penal Code. Factually, these are the glaring differences from *Low Soo Song*'s case and *Ong Poh Cheng*'s case.

[71] In construing s 3 of the Act it is ideal to refer to the meaning of the word 'robbery' — the scheduled offence under s 2 of the Act, by referring to s 390 of the Penal Code. That section reads as follows:

> Robbery
>
> 390
>
> (1) In all robbery there is either theft or extortion.
>
> (2) Theft is 'robbery', if, in order to commit theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death, or hurt, or wrongful restraint, or fear of instant death, or of instant hurt, or of instant wrongful restraint.
>
> (3) Extortion is 'robbery', if the offender, at the time of committing the extortion, is in the presence of the person put in fear and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.
>
> Explanation — The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.
>
> ILLUSTRATIONS
>
> (a) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and, in order to commit that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.
>
> (b) A meets Z on the high road, shows a pistol, and demands Z's purse. Z, in consequence surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence, A has therefore committed robbery.
>
> (c) A meets Z and Z's child on the high road. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence, delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of instant hurt to the child, who is there present. A has therefore committed robbery on Z
>
> (d) A obtains property from Z by saying — 'Your child is in the hands of my gang, and will be put to death unless you send us one thousand ringgit'. This is extortion, and punishable as such; but it is not robbery, unless Z is put in fear of the instant death of his child.

(e) Z is walking along a road. A on a motorcycle snatches Z's handbag and in the process causes hurt to Z. A rides away with Z's handbag. A has therefore committed robbery.

[72] In our judgment, in applying s 390 of the Penal Code, the commission of the offence of robbery did not end nor can it be considered complete when the cash monies were taken away — out of Maybank, by the robbers. Put in another way, the episode of committing robbery by the robbers cannot be considered to have ended or completed when the robbers got out of Maybank on that fateful day. The commission of the offence of robbery continued unabated until their arrest and the recovery of the cash monies on the road. Support for this proposition can be found in the judgment of Vishnu Sahai J in the case of *State of Maharashtra v Vinayak Tukaram Utekar and another* [1997] Cri LJ 3988 (Bombay) at p 3992:

26. Our view is fortified by the decision of the apex court reported in AIR 1980 SC 788: (1980 Cri LJ 313), *Kusho Mahton v State of Bihar*, cited by Mr SR Borulkar learned counsel for the appellant in both the appeals. We intend reproducing the relevant portion from the same. It reads thus:

> After hearing counsel for the parties, we are of the opinion that the appellants have been rightly convicted under s 395 of the Indian Penal Code, because while carrying away the stolen property they exploded cracker to frighten the inmates of the house who wanted to pursue them.

27. We are in respectful agreement with the said judgment of the Apex Court.

28. Mrs Revati Dere with her characteristic ingenuity urged that the crucial words used in s 390 of the IPC are 'for that end'. She urged that if the end is in order to the committing of the theft or in committing the theft or in carrying away or attempting to cany away property obtained by theft the offender causes any injury etc the offence would certainly be robbery. But she urged that in this case a perusal of the evidence of the informant clearly indicates that the intention of the respondent in assaulting the informant Hemant Holkar with a knife was only to extricate himself from his clutches and not to ensure his taking away of the property which he had snatched from the informant.

29. We are afraid that Mrs Revati Mohite Dere is cutting it indeed too fine. Common sense admits of no dispute that a person who would commit a robbery would also attempt to run away with stolen articles with the utmost promptitude and if the victim or witnesses would try to obstruct this design of his he would assault them with the weapon with which he is armed. Therefore, the contention of Mrs Dere, on the facts of this case, that the respondent Vinayak gave a knife blow to the informant only to extricate himself from his clutches and not to accomplish his design of carrying away the gold buttons which he had obtained during the course of theft cannot be accepted.

30. We wish to emphasise that in most of the cases where an offender obtains a property during theft and which the victim or witnesses try to catch him the offender tries to run away and if armed with a weapon assaults them, both the facets namely:

(a) in attempting to carry away property obtained by theft the offender causing hurt to the person who is trying to foil his attempt; and

(b) the normal instinct of self-preservation on account of which the offender tries to run away and foil the bid of the person who endeavours to thwart it by assaulting the said person, may co-exist.

To ignore facet (a) in our judgment, would cause gross miscarriage of justice.

31. There can be no quarrel that knife is a deadly weapon within the ambit of expression 'deadly weapon' as used in s 397 of the IPC.

32. For the said reasons we find no merit in the submission of Mrs Revati Mohite Dere and find merit in the submission of Mr Borulkar that respondent is guilty of an offence punishable under s 397 of the IPC.

[73] Common sense dictates that if any of Maybank's employees or customers were to thwart the designs of the armed robbers during the commission of the bank robbery inside the bank, they would surely be shot by the robbers. The two gunshots that were fired inside the bank aimed at the ceiling must surely be warning shots to show that the robbers had the intention of causing death or hurt to any person inside the bank. And such an intention continued unabated when gunshots were exchanged with the police personnel outside the bank. The offence under s 3 of the Act read with s 34 of the Penal Code cannot be said to have ended when the robbers left Maybank and fled with the loot. The words 'at the time' appearing in s 3 of the Act must be generously construed to give 'life' and 'meaning' to the intention of Parliament. And that intention would be to curb bank robbery under s 3 of the Act within our shores.

[74] The appellant cannot be allowed to argue that gunshots were exchanged with the police personnel after and not during the commission of the bank robbery. The whole episode must be taken as a whole and cannot be taken on a piecemeal basis. By invoking s 390 of the Penal Code in order to construe the designs of the appellant and the deceased, an offence under s 3 of the Act read with s 34 of the Penal Code had been committed. The appellant cannot take advantage of his own wrong and escape the rigours of s 3 of the Act. Fletcher Moulton LJ in *Kish v Taylor* [1911] 1 KB 625, at p 634 aptly said that:

> … a man may not take advantage of his own wrong. He may not plead in his own interest a self-created necessity.

[75] Tindal CJ, in *The Sussex Peerage* (1844) 11 C & F 85 at p 143, in style said:

> But if any doubt arises from the terms employed by the legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (*Stowel v Lord Zouch* (1568) 75 ER 1 Plowden 353 at p 369), is 'a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress'.

[76] Here, the preamble to the Act reads as follows:

> An Act to provide increased penalties for the use of firearms in the commission of certain offences and for certain offences relating to firearms, and to make special provision relating to the jurisdiction of courts in respect of offences thereunder and their trial.

[77] The preamble certainly sets out the scope of the Act and it is an aid to construing s 3 of the Act (*John Stowel v George Zouch, Lord Zouch Saintmaure and Cautelupe* (1568) 75 ER 1 Plowden 353; *Fenton (Pauper) v J Thorley & Co, Ltd* [1903] AC 443 (HL); *Doe On The Demise of John Bywater v Charles John Brandling* (1828) 108 ER 7 B & C 643; *Halton, Clerk v Cove, Clerk* (1830) 109 ER 1 B & Ad 538; and *Ram Kirpal v Shri Krishna Deo Pratap Singh* AIR 1948 Allahabad 108).

[78] It is manifestly absurd and repugnant to consider the robbery that took place inside Maybank and the firing of two gunshots inside Maybank separately with the bid to escape with the loot and the exchange of gunshots with the police personnel outside Maybank. All these should be construed as a whole in construing the offence under s 3 of the Act. The language in s 3 of the Act must be construed according 'to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further' (per Parke B in *Becke, Assignee of Wm Ashton, an Insolvent Debtor v Smith* (1836) 2 M & W 191 at p 195). If we were to accept the arguments that the episode inside Maybank ended when the appellant and the deceased went out of Maybank with the loot and that the appellant cannot be convicted for an offence under s 3 of the Act read with s 34 of the Penal Code, then we are condoning armed bank robbery within our shores. That cannot be the law.

[79] When the Bill to the Act was tabled before Parliament it carried an 'Explanatory Statement' which was worded in this way:

A The object of this Bill is to increase the present penalties for using arms in the commission of extortion or robbery, to prevent or resist arrest or to facilitate escape from lawful custody.

The Arms Act, 1960 provides for a penalty of not more than ten years' imprisonment for possessing arms at the time of committing any one of a very large
B number of offences (including extortion and robbery), in addition to the penalty for the offence itself, for example, if a person is convicted of robbery and sentenced to seven years' imprisonment, he may be sentenced to an additional term not exceeding ten years if it is proved that at the time of the robbery he was in possession of arms.

This Bill seeks to increase the penalties for using, as distinct from the mere
C possession of, arms. It is confined to the use of firearms and explosives (Clause 2(1)).

Clause 3 provides the death penalty for the discharging of a firearm (including the exploding of a bomb or grenade) in committing, attempting to commit or abetting the commission of a scheduled offence.

Clause 4 provides imprisonment for a term not exceeding 20 years, and whipping,
D for exhibiting a firearm (including a bomb or grenade), in a manner likely to cause fear, in committing, attempting to commit or abetting the commission of a scheduled offence.

Clause 1(4) provides that the Act may be annulled by resolutions passed by both Houses of Parliament, but without prejudice to anything previously done by virtue
E of the Act.

[80] In order to understand the history behind the Bill, reference to *Hansard* should be made. In 1992 Lord Griffiths in *Pepper (Inspector of Taxes) v Hart and*
F *related appeals* [1993] 1 All ER 42, at p 50, had this to say:

> The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.

G

[81] It was in this case that the House of Lords accepted the principle for the very first time that judges could refer to the Parliamentary debates reported in *Hansard* in order to ascertain the meaning of an Act of Parliament.

H **[82]** We will now refer to the *Hansard* in order to understand the true purpose and intention of the Act. At the third Parliamentary sitting of the 'Dewan Ra'ayat' (House of Representatives) on 27 July 1971, the Honourable Attorney General Tan Sri Abdul Kadir bin Yusof ('AG') said at p 3850 of the *Hansard*:

I

> What we are bringing here is an amendment for an enhanced, a higher, penalty for committing robbery and kidnapping and other offences as stated there, four types, if they used firearms; if they used penukul, paku, or parang or any other weapon it is just like ordinary crime. But what we are going to kill is the use of firearms, bomb and grenade, when committing crimes because this is on the increase now.

[83] At p 3851 of the *Hansard*, the AG continued to say as follows:

> When we drafted this law we adapted it to the needs of this country, the social conditions, the national interest and the people when this news had gone to the paper, the majority of the people supported it, the Conference of Rulers supported it and demanded that whoever uses firearms shall be punished with death. And whether they will be sentenced or not, we leave it to the Pardons Board.
>
> We need this to be a deterrent to prevent those using firearms. They may use other weapons, but not firearms because now the use of firearms is on the rampant, on the increase, and many people have been injured and killed because of the use of firearms. Dato' Yang di-Pertua, a mere show of firearms will frighten the wit out of anyone. It is different if it is a knife, a stick or other things; they may use the 'Koontow', the 'Silat Gayong' or what not. But with firearms, all those Silat and all the Koontow is not easy, and we are asking this House that if firearms are used with intention to cause death, it is punishable with death.

[84] And at the third Parliamentary sitting of the 'Dewan Negara' (Senate) on 10 August 1971, Dato' JES Crawford said at p 1036 of the *Hansard*:

> Dato' J.E.S. Crawford: (Dengan izin) Mr President, Sir, I rise to fully support, completely, this measure which, in my opinion, is long overdue. There have been so many crimes of violence with the use of firearms all over the country; and the plantation industry, Sir, for which I speak, also has had a lot of difficulty recently in payroll hold-ups, with armed payroll hold-ups, leading either to death or injury. So, we fully support this Bill.
>
> I would like to congratulate the Cabinet, in particular the Attorney-General, Sir, for introducing it and I strongly support it.

[85] From the debates in Parliament as seen from the *Hansard*, the Act was born out of necessity, so to speak, to curb the use of firearms to commit 'armed payroll hold-ups, leading either to death or injury'. And in the words of the AG in the *Hansard* 'now the use of firearms is on the rampant, on the increase, and many people have been injured and killed because of the use of firearms'. The crime rate in 1971 as reflected in the *Hansard* is no difference from what had happened in Maybank on that fateful day. The armed robbery in Maybank using firearms and the shoot-out with the police personnel outside Maybank seen in the context of s 390 of the Penal Code shows the culpability of the appellant under s 3 of the Act read with s 34 of the Penal Code. The purposive approach in construing s 3 of the Act will blend with the object of tabling the Act in Parliament in 1971.

[86] On the facts, it is a gross miscarriage of justice not to convict the appellant for committing the offence as per the amended charge in exh 'P112'.

[87] Had *Ong Poh Cheng*'s case considered s 390 of the Penal Code, the decision might well be different.

[88] We have perused through the appeal record with a tooth comb and mulled through the evidence. We found no appealable error. It is our judgment that the appellant had failed to raise any reasonable doubt as to his guilt. We are satisfied that the prosecution had proved beyond reasonable doubt the amended charge in exh 'P112' against the appellant. We dismissed the appellant's appeal. The conviction and sentence are hereby affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum